

This letter confirms that the transfers of software made pursuant to the Master Software License Agreement referenced in the letter qualify as licenses of computer software and are not subject to Retailers' Occupation Tax or Use Tax liability. 86 Ill. Adm. Code 130.1935. (This is a PLR).

April 18, 2001

Dear Xxxxx:

This Private Letter Ruling, issued pursuant to 2 Ill. Adm. Code 1200 (which can be found at <http://www.revenue.state.il.us/legalinformation/regs/part1200>), is in response to your letter of March 16, 2001 and your fax dated April 6, 2001. Review of your request for a Private Letter Ruling disclosed that all information described in paragraphs 1 through 8 of subsection (b) of Section 1200.110 appears to be contained in your request. This Private Letter Ruling will bind the Department only with respect to AAA for the issue or issues presented in this ruling. Issuance of this ruling is conditioned upon the understanding that neither AAA nor a related taxpayer is currently under audit or involved in litigation concerning the issues that are the subject of this ruling request.

In your letter, you have stated and made inquiry as follows:

I am requesting a Private Letter Ruling, pursuant to 2 Ill. Adm. Code 1200, Sec.110 on behalf of AAA. AAA is not under audit or investigation by the Illinois Department of Revenue. Enclosed is a power of attorney authorizing me to represent AAA in making this request.

FACTS

The Department of Revenue has not previously ruled on this issue or any other issue for AAA or any related entity. There have been no previous requests for rulings by AAA or its related entities and no request for ruling has ever been withdrawn before a ruling letter was issued.

AAA is a retailer of computers, computer software and other tangible personal property. AAA acts as a purchasing company for its parent and affiliated companies and may make sales to unrelated third parties. It is incorporated in the COUNTRY and has its principal offices in CITY, IL.

As a part of its business AAA sells or licenses computer software. All of the computer software sold by AAA is purchased from other software suppliers and creators. All of the software is subject to various license agreements executed with the suppliers and creators.

When AAA sells computer software to its customers it enters into a Master License Agreements with its customers. The Master License Agreement includes, by reference,

the license terms of the software suppliers and creators, the terms required by AAA and seeks in general to standardize the license terms AAA for its customers. The Master License Agreement contains all of the five requirements specified in the Department's Computer Software Regulation, 86 Ill. Adm. Code, Sec. 130.1935. A draft copy of the Master License Agreement is attached for your review.

RULINGS REQUESTED

AAA requests a ruling from the Department that its purchases of software from software creators and suppliers for resale under the terms of AAA's Master License Agreements will qualify as purchases for resale under the Illinois Retailers' Occupation Tax and Use Tax. AAA understands that it may be required to provide the software creators and suppliers with valid Illinois certificates of resale. AAA also requests a ruling from the Department that its subsequent sales of software under the terms of AAA's Master License Agreement do qualify for exemption under the provisions of Section 130.1935 (a), above.

LAW and ANALYSIS

The Illinois Retailers' Occupation Tax and Illinois Use Tax each contain specific exemptions for tangible personal property purchased for the purposes of resale. 35 ILCS 120/1; 35 ILCS 105/2. Sales of canned software are deemed to be subject to the Illinois Retailers' Occupation Tax by Section 130.1935. Therefore, the purchase of software for resale would be exempt from Retailers' Occupation Tax and Use Tax. In this respect the purchase of computer software is no different than the purchase of any other tangible personal property. The question of whether or not a subsequent sale of property purchased for resale is subject to tax at the time of the resale does not affect the resale exemption and its applicability to the taxation of the purchase. For example a retailer may take advantage of a resale exemption when buying inventory even if it is known at the time of purchase that the inventory will be sold for resale or in a non-taxable transaction as exempt property or to a party who enjoys a tax-exempt status.

Section 130.1935 sets five criteria for licenses of computer software. If a license of canned software meets these criteria it is exempt from Retailers' Occupation Tax. Section 130.1935 (C) (2) provides that a programmer may purchase canned software for resale and if he modifies the software to a sufficient degree he may sell the modified software as tax-exempt custom software. Since the Master License Agreement meets all five of the Section 130.1935 criteria, the purchase of software for resale and subsequent resale of the software under the Master License Agreement will be exempt from Retailer' Occupation Tax and Use Tax.

We are unaware of any other law, regulation, Department ruling or other authority that suggests that the above described transactions would be subject to tax.

If the Department requires additional information prior to issuing a Private Letter Ruling or if the Department anticipates issuing a ruling contrary to the above analysis, please contact the undersigned.

DEPARTMENT'S RESPONSE:

If transactions for the licensing of computer software meet all of the criteria provided in subsection (a)(1) of 86 Ill. Adm. Code 130.1935, neither the transfer of the software or the subsequent software updates will be subject to Retailers' Occupation Tax. A license of software is not a taxable retail sale if:

- A) It is evidenced by a written agreement signed by the licensor and the customer;
- B) It restricts the customer's duplication and use of the software;
- C) It prohibits the customer from licensing, sublicensing or transferring the software to a third party (except to a related party) without the permission and continued control of the licensor;
- D) The licensor has a policy of providing another copy at minimal or no charge if the customer loses or damages the software, or permitting the licensee to make and keep an archival copy, and such policy is either stated in the license agreement, supported by the licensor's books and records, or supported by a notarized statement made under penalties of perjury by the licensor; and
- E) The customer must destroy or return all copies of the software to the licensor at the end of the license period. This provision is deemed to be met, in the case of a perpetual license, without being set forth in the license agreement.

Based upon our review of the AAA Master Software License Agreement enclosed with your letter ruling request, the transfer or sale of computer software subject to that Master Software License Agreement would meet the requirements of subsection (a)(1) of Section 130.1935 of the Department's Administrative rules and would not be a taxable retail sale under the Illinois Retailers' Occupation Tax Act (35 ILCS 120/1 et seq.) and Use Tax Act (35 ILCS 105/1 et seq.). AAA may acquire computer software for resale that is being transferred subject to AAA's Master Software License Agreement. If the purchases of canned computer software for resale are made from suppliers that are required or have voluntarily registered to collect Illinois Use Tax, AAA should provide valid Certificates of Resale to those suppliers. See 86 Ill. Adm. Code 130.1405.

The facts upon which this ruling are based are subject to review by the Department during the course of any audit, investigation, or hearing and this ruling shall bind the Department only if the material facts as recited in this ruling are correct and complete. This ruling will cease to bind the Department if there is a pertinent change in statutory law, case law, rules or in the material facts recited in this ruling.

I hope this information is helpful. If you have questions regarding this Private Letter Ruling you may contact me at (217) 782-2844. If you have further questions related to the Illinois sales tax laws, please visit our website at www.revenue.state.il.us or contact the Department's Taxpayer Information Division at (217) 782-3336.

Very truly yours,

Terry D. Charlton

Associate Counsel

TDC:msk
Enc.